

**IN THE HIGH Court OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 24.1.2019

1. CRM-M-14159-2017 (O&M)

Gopi Ram Jain v.

... Petitioner(s)

VERSUS

Attar Singh

...Respondent(s)

2. CRM-M-14141-2017; Gopi Ram Jain v. Raj Bala
3. CRM-M-14142-2017; Gopi Ram Jain v. Raj Bala
4. CRM-M-14148-2017; Gopi Ram Jain v. Sunita
5. CRM-M-14150-2017; Gopi Ram Jain v. Khazan Singh
6. CRM-M-14159-2017; Gopi Ram Jain v. Attar Singh
7. CRM-M-14160-2017; Gopi Ram Jain v. Sunita
8. CRM-M-14201-2017; Gopi Ram Jain v. Jai Singh
9. CRM-M-14253-2017; Gopi Ram Jain v. Jai Singh
10. CRM-M-14359-2017; Gopi Ram Jain v. Urmila
11. CRM-M-34889-2017; Sulekh Jain v. Jai Singh
12. CRM-M-34890-2017; Sulekh Jain v. Khazan Singh
13. CRM-M-34891-2017; Sulekh Jain v. Sunita
14. CRM-M-34892-2017; Sulekh Jain v. Rajbala
15. CRM-M-34893-2017; Sulekh Jain v. Khazan Singh
16. CRM-M-34894-2017; Sulekh Jain v. Urmila
17. CRM-M-34895-2017; Sulekh Jain v. Jai Singh
18. CRM-M-34897-2017; Sulekh Jain v. Rajbala
19. CRM-M-34898-2017; Sulekh Jain v. Sunita

20. CRM-M-28880-2017; Sulekh Jain v. Attar Singh
21. CRM-M-39817-2017; Sulekh Jain v. Jai Singh
22. CRM-M-42996-2017; Sulekh Jain v. Khazan Singh

CORAM: HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present: Mr. Karanvir Singh Khehar, Advocate.
for the petitioner.

Mr. Jai Singh Yadav, Advocate,
for the respondent.

RAJ SHEKHAR ATTRI, J.

This order shall dispose of the bunch of aforesaid 22 petitions as common questions of law and facts are involved in all of them. The facts are extracted from CRM-M-14159-2017 for presence of convenience and the parties would be referred by their status in this petition.

The present petition (CRM-M-14159-2017) has been filed under Section 482 of Code of Criminal Procedure for quashing criminal complaint No.156 of 2.11.2016 (NI Act Case No.777 of 2016) (Annexure P-1) filed by the complainant-respondent under Section 138 of Negotiable Instruments Act as well as subsequent proceedings including summoning order dated 2.11.2016 passed by learned Judicial Magistrate, 1st Class, Rewari whereby the petitioner along with others have been summoned to face trial under Section 138 of Negotiable Instruments Act.

This case has chequered history. M/s S.K.G. Buildcon Private Limited is a registered Company (hereinafter referred to as “the Company”). It seems that the Company along with its group Company M/s Ambition Colonisers Private Limited developed a residential colony on a piece of land

Maheshwari, District Rewari (Haryana). This land was adjacent to the land measuring 27K-10M owned and possessed by the private respondents/complainants along with other co-sharers who are also impleaded as respondents in connected petitions. The Company has obtained Letter of Intent (in short, 'LOI') for the purpose of developing said colony in October, 2012 and obtained licence from the competent authority in March, 2013 to develop this colony on the land measuring 13.237 acres.

A bare perusal of Annexure R-2 (which is a plaint of the suit filed by the Company against the land owners) shows that necessary sanction was accorded to the Company by the competent authority and immediately thereafter, the Company started development of Group Housing Residential Complex in the name and style of M/s Kaasa Ramana and earlier this complex was given the name of ARAVALI GREEN VILLAGE. The Company asserts that the house building project got good response and more than 150 flats had already been booked by the intending purchasers before the sale of the land of the private respondents and other co-sharers came into existence. However, the adjacent land measuring 27K-10M was also purchased by the Company vide sale deed dated 10.9.2013 (registered vide No.1311 dated 11.9.2013) from the land owners namely Khazan Singh, Attar Singh, Jai Singh, Smt. Urmila, Smt. Rajbala and Smt. Sunita for a total consideration of ₹17,18,75,000/-. However, the consideration was paid through cheques and some of them were post-dated cheques which are also duly mentioned in the sale deed dated 10.9.2013. The details of these cheques are duly mentioned in the sale deed which are as under : -

Cheque Number	Date	Amount (₹)	Name of Bank	Particulars
005948	10.09.2013	5,00,000	Bank of Maharashtra	Khazan Singh
005949	10.03.2014	25,00,000	Bank of Maharashtra	Khazan Singh
005950	10.09.2016	2,11,87,500	Bank of Maharashtra	Khazan Singh
005966	10.09.2016	5,00,000	Bank of Maharashtra	Khazan Singh
005951	10.09.2013	10,00,000	Bank of Maharashtra	Attar Singh
005952	10.09.2014	50,00,000	Bank of Maharashtra	Attar Singh
005953	10.09.2016	4,30,62,500	Bank of Maharashtra	Attar Singh
005954	10.09.2013	5,00,000	Bank of Maharashtra	Jai Singh
005967	10.09.2014	5,00,000	Bank of Maharashtra	Urmila
005955	10.09.2014	25,00,000	Bank of Maharashtra	Jai Singh
005968	10.09.2016	5,00,000	Bank of Maharashtra	Jai Singh
005956	10.09.2016	2,08,75,000	Bank of Maharashtra	Jai Singh
005957	10.09.2013	5,00,000	Bank of Maharashtra	Urmila
005958	10.09.2014	25,00,000	Bank of Maharashtra	Urmila
005959	10.09.2016	2,08,75,000	Bank of Maharashtra	Urmila
005960	10.09.2013	5,00,000	Bank of Maharashtra	Rajbala
005961	10.09.2014	25,00,000	Bank of Maharashtra	Rajbala
005962	10.09.2016	2,11,87,500	Bank of Maharashtra	Rajbala
005969	10.09.2016	5,00,000	Bank of Maharashtra	Rajbala
005963	10.09.2013	5,00,000	Bank of Maharashtra	Sunita
005964	10.09.2014	25,00,000	Bank of Maharashtra	Sunita
005965	10.09.2016	2,11,87,500	Bank of Maharashtra	Sunita
005970	10.09.2016	5,00,000	Bank of Maharashtra	Sunita

Out of abovementioned cheques, six cheques were of dated 10.9.2013 while the remaining were all post dated cheques i.e. dated 10.3.2014 and 10.9.2016.

Thus, the sale consideration was paid in pursuance of the above said bank cheques and the sale was complete on the day of execution and registration of said sale deed.

It is specifically stated in the complaint (Annexure P-1) that the petitioner at the time of issuance of the above said cheques had assured the vendors that the cheque would be honoured on presentation and this is why

the sale deed was executed on this assurance. However, cheques dated 10.9.2013 and 10.3.2014 were encashed whereas cheques dated 10.9.2016 for a total sum of ₹ 4,30,62,500/- was dishonoured on the ground that one of the directors of the Company namely Shri Vikas Jain had written a letter to stop the payment. However, the complainant asserts that on his inquiry, it was revealed that there was not sufficient balance in the bank account to honour the cheques and as such, the cheques were dishonoured and the complaint was filed.

After conducting preliminary inquiry, learned Magistrate ordered to summon the petitioner along with others vide order dated 2.11.2016 passed by learned Judicial Magistrate, 1st Class, Rewari. Similarly, the remaining cheques given as sale consideration were also dishonoured and after serving upon legal notices, the holders thereof filed separate complaints under Section 138 of Negotiable Instruments Act. Those complaints as well as order of summoning have been impugned in the remaining petitions.

Through this petition, the complaint (Annexure P-1) and order of summoning the petitioner (Annexure P-7) have been assailed before this Court, *inter alia*, on the grounds that payment was stopped, therefore, provisions of Section 138 of Negotiable Instruments Act are not applicable; that petitioner Gopi Ram Jain was not an active partner, apart from it, he has resigned from the Company much before filing the complaint, therefore, order of summoning against him is absolutely illegal and not sustainable in the eyes of law. It has also been pleaded that he is suffering from serious mental ailments.

petition as well as other material available on record.

Learned counsel for the petitioner has vehemently contended that the vendor-complainant did not disclose the true facts at the time of execution of the sale deed especially the vendors failed to disclose that a road has been constructed in the land of the vendors; that the civil suit has already been filed for setting aside the sale deed; that giving directions to the bank for stopping payment does not attract the provisions of Section 138 of Negotiable Instruments Act; that Shri Gopi Ram Jain petitioner was a sleeping director of the Company and he had no concern with the day to day affairs of the Company, therefore, summoning order qua him is also void and illegal. He further submitted that there were oral agreements between the Company and the vendors with regard to cancellation of sale deed; that adequate notices were given with regard to stopping the payment and in fact, the vendors/private respondents had played fraud with the Company and this is why, an application was filed with the police to register FIR against them. In support of his contentions, he placed reliance upon the judgments of Hon'ble Supreme Court in **Pooja Ravinder Devidasani v. State of Maharashtra and another**; 2015 (3) SCC (Civil) 384, **N.K.Wahi v. Shekhar Singh and others**; 2007 (2) RCR (Criminal) 266; **Saroj Kumar Poddar v. State (NCT of Delhi) and another**; 2007(1) RCR (Criminal) 741, **GHCL Employees Stock Option Trust v. India Infoline Limited**; (2013) 4 SCC 505 and **K.K.Sidharthan v. T.P. Praveena Chandran and another** decided on **8.10.1996**.

On the other hand, learned counsel for the complainant has strenuously contended that the cheques were part of the sale consideration

and therefore, asking the bank to stop payment is itself amounted to

cheating; *prima facie* case under Section 138 of Negotiable Instruments Act has been made out against the petitioners; that no notice has been served upon the vendors as alleged by the petitioners; that the malafide intention of the petitioners is very much visible from the bare perusal of each of the petitions. According to him, the petitioners have played fraud and committed cheating with the poor land owners and their valuable property has been grabbed by them. In support of his contentions, he placed reliance upon the judgments of Hon'ble Supreme Court in **K.K.Ahuja v. V.K.Vora and another**; 2009 (3) RCR (Criminal) 571, **Standard Chartered Bank v. State of Maharashtra and others**; 2016 (2) RCR (Criminal) 778, **Goaplast Pvt. Ltd. v. Shri Chico Ursula D' Souza and another**; 2003 (2) RCR (Criminal) 131, of Delhi High Court in **Shree Raj Travels & Tours Ltd and others v. Destination of the World (Subcontinent) P. Ltd.**; 2010 (7) RCR (Criminal) 1484 and of this Court in **Kailash Chand Jain v. M/s Bibby Financial Services India Pvt. Ltd.** 2014 (2) RCR (Criminal) 185, **Shri Krishan Garg v. Smt. Rajni Jain and others**; 2014 (23) RCR (Criminal) 145 and **Abhishek Sharma v. M/s J.S.Trading Company** vide CRM-M-31053-2017 decided on 16.10.2018.

This Court has given its thoughtful consideration to the rival contentions. In this case, following points have arisen for discussion : -

1. Whether the provisions of Section 138 of Negotiable Instruments Act have been made out for the purpose of the prosecution of the petitioners?
2. Whether oral agreements have been substituted with contract of sale?
3. Whether Gopi Ram Jain petitioner was a sleeping

Director?

It is an admitted fact that the Company had purchased land of poor farmers i.e. the vendors who have been impleaded as private respondents. The sale consideration was paid in instalments by way of cheques which are duly incorporated in the sale deed. The said sale is complete and valid under the provisions of Section 54 of the Transfer of Property Act which provides that the sale is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised. Thus, if the sale consideration paid or to be paid in future, it is a valid consideration and sale is complete.

A bare perusal of the documents placed on record transpires that the Company by adopting different pleas had started backing out of the contract of sale. Firstly, they took the plea that there is a complete downfall in the sale prices in the real estate market. Subsequently, another plea was manufactured to the effect that an oral agreement was entered into between the parties which substitutes the sale contract.

A bare perusal of notice dated 19.8.2016 (Annexure P-7) placed on the record by the petitioners transpires that in the first paragraph of this document, it is admitted that the Company purchased the land from the land owners and had paid different cheques as sale consideration. However, it is mentioned in this document as under : -

“It is noteworthy that these cheques will become due for payment on 10.09.2016. You may know that the real estate market in India, especially in the national capital region, is in deep trouble as most builders have large number of unsold flats/inventory. There are low sales with falling prices and

slowdown in real estate investment and as a result transactions are not happening. The sales of the housing units have hit an all-time low. As a result of this situation we may not be able to develop/sell the housing units we planned on above-mentioned land. Due to the slump in realty market we are facing financial difficulties and at present we are in such a situation that we are not even able to make payments of the regular EMI for the loan taken from the bankers.

In view of above facts it is advised that above-mentioned cheques shall not to be presented to bank for payment without our written consent. We are also advising bank to stop payment of these cheques. If in spite of these facts you want to insist payment of these cheques we would like to advice that (since we will remain unable to honor payment of these cheques) we can mutually discuss about the other options (including surrender of this land) in this matter...” (emphasis supplied)

No material has been placed on record if said notice Annexure P-3 has even been served upon the vendors.

The Company has further relied upon another notice Annexure P-8 (which is without any date). Along with the notice, the Company had produced photocopies of the sale deed along with postal receipts dated 29.8.2018. It is mentioned that the vendors of the sale deed No.1311 dated 11.9.2013 had sold the land and in lieu of the sale consideration, the cheques were paid. In paragraphs 3 and 4 of the said notice (Annexure P-8), it is mentioned as under : -

“3. That my client had purchased the above land to develop it as group housing units/flats. The above land is situated within the NCR region. Due to recession in real estate market, the flats to be constructed by my client over the above land could not be sold. Whereas my client has got CLU from Govt.

of Haryana and had paid a sum of ₹ 47,49,907/- as CLU charges. My client had also paid a sum of ₹ 85,94,000/- on the above sale deed dated 11.9.2013.

“4. That my client asked you on several occasion to pay a sum of ₹ 2,15,00,000/- (₹ Two crore fifteen lakh), which was received by you from my client. It is also pertinent that my client had issued the following post-dated cheques. The details of the same are as under : -

Sr No.	Cheque issued in favour of	Particulars of cheques	Amount (₹)
1	Khajan Singh	005950 dated 10.9.2016 of Bank of Maharastra	2,11,87,500/-
2	Khajan Singh	005966 dated 10.9.2016 of Bank of Maharastra	5,00,000/-
3	Attar Singh	005953 dated 10.9.2016 of Bank of Maharastra	4,30,62,500/-
4	Jai Singh	005968 dated 10.9.2016 of Bank of Maharastra	5,00,000/-
5	Jai Singh	005956 dated 10.9.2016 of Bank of Maharastra	2,08,75,000/-
6	Urmila	005959 dated 10.9.2016 of Bank of Maharastra	2,08,75,000/-
7	Rajbala	005962 dated 10.9.2016 of Bank of Maharastra	2,11,87,500/-
8	Rajbala	005969 dated 10.9.2016 of Bank of Maharastra	5,00,000/-
9	Sunita	005965 dated 10.9.2016 of Bank of Maharastra	2,11,87,500/-
10	Sunita	005970 dated 10.9.2016 of Bank of Maharastra	5,00,000/-

You are well aware that real estate market has great slab (sic, 'slump') and most of the builders including my client are having large number of unused land, unsold flats and plots etc. Therefore, the prospective buyers are not intended to purchase the flats in the above project of my client. Hence, my clients also approached you and requested you to get cancellation of the above sale deed No.1311 dated 11.9.2013 and get the actual and physical possession of the above land i.e. 27 Kanal 10 Marla and to return the above post dated cheques dated

10.9.2016 to my client. My client also requested you not to present the above post dated cheques for clearance with the banker of my client i.e. Bank of Maharashtra. It is also pertinent that my client is in chronic/acute shortage of finance/money/liquidation.” [Emphasis supplied]

The Company has also admitted that the cheques dated 10.9.2016 on presentation were dishonoured and, therefore, the vendors-respondents had issued a notice dated 26.9.2016 (Annexure P-5) under Section 138 of Negotiable Instruments Act. While replying the said notice vide reply dated 14.10.2016 (Annexure P-6), the Company has admitted in para 2 to 7 as under : -

“2. That my client Company & its group Company Ambition Colonisers Pvt. Ltd. was having an existing 13.237 acre land in Village Maheshwari, Sub-Teh. Dharuhera for which my client Company had obtained LOI on 31.10.2012, license was obtained on 18.03.2013 and building plan was sanctioned on 16.04.2013 by Govt. of Haryana and its authorities and thereafter, the Company started booking of the flats. You and other land owners were having joint agricultural land comprised in Khewat No.5, Khatoni No.5, Rect. No.34, Kila No.11(7-8), 19(8-0), 20(8-0), 22/1(4-2) total measuring 27 Kanal 10 Marla (3.4375 acre) situated in the revenue estate of vill. Maheshwari, Sub-Teh. Dharuhera, Distt. Rewari vide fard jamabandi for the year 2008-09, just adjoining to my client's land, which did not have access from any existing or proposed wide road. You and other land owners approached my client's Company in the mid of July 2013, to purchase you land to which my client Company refused. You repeatedly approached my client with various proposals and requested to work out something since you were in need of money because of various family affairs. On your repeated requests, my client accepted

your proposal to enter into a collaboration with all of you on the terms that some money will be given upfront to you as security and balance to be paid by way of allotment of flats which will be developed on the combined land on a condition that you will get the sale deed executed in favour of my client's Company name to avoid various government dept. problems which might arise if the land were in your name. The final account would be done after the completion of the project. You all agreed to it and requested to set a tentative timeline for the completion of the project as well as give ample amount in the beginning to manage the family affairs and finalize the percentage of apartment to be allotted to you. It was discussed that project could be completed in 3 years and you initially need approx 2,00,00,000/- in order to manage all your family affairs and flats built thereon equivalent to approx 20.5% of the FAR area will be allotted to you after the completion of the project.

3. Further the value of 20.5% of the flats constructed thereon was worked out which were to be given to you as your share and were calculated as 20.5% of the FAR area of approx. 76,230 Sq. Ft. per acre, which is equal to approx 15,627 Sq. Ft per acre X 3.4375 acre = total 53.718 Sq. ft saleable area. But since the flat sizes will vary from one to the other, so a tentative rate of Rs. 3,200/- per Sq. Ft. was agreed for the calculation of security amount (all inclusive of development cost, license cost, EDC & IDC charges etc.) further to make it simple it was agreed to issue the security cheques as per Rs.5,00,00,000/- per acre x 3.4375 acre which is equal to approx Rs.17,18,75,000/- and the actual account will be done at the time of completion of the project and the actual amount will be calculated and finalized at the time of completion of the project.

4. Accordingly an oral agreement was entered between my client and you (i.e. land owner of 27 Kanal 10 Marla land) that against the sale deed in favour of the Company, the Company

will give security cheques as Rs. 35,00,000/- current dated cheques, Rs.1,80,00,000/- PDC's for after 6 months by which time the Company expects to obtain the LOI for the said land and balance 15,03,75,000/- PDC's for after 3 years by which time the Company expected to have completed the project on the said land and thereafter, i.e. 3 years from the date of the above sale deed i.e. 11.09.2013, all the above PDC's (amounting to Rs.15,03,75,000/-) were agreed to be returned against the allotment of flats, also it was agreed that Rs.2,15,00,000/- paid vide current dated cheques & PDC's dated 10.03.2014 shall be refunded to my client by cheque against the allotment of flats of equal value or the Company shall allot lesser flats equal to this value.

5. It is note worthy that at the time of execution of the above sale deed, the prevailing average rate of land was Rs.40,00,000/- (Rs. Forty Lakh) per acre approx. in village Maheshwari and in its adjoining villages. The circle rate for the year 2012-13 and 2013-14 was Rs.40,00,000/- (Rs. Forty lakh) per acre and Rs.60,00,000/- (Rs.Sixty Lakh) per acre respectively. But as per oral collaboration the sale deed for land measuring 27 Kanal 10 Marla (3.4375 acre) was executed on 11.09.2013 in favour of my client Company for a total sale consideration of Rs.17,18,75,000/- (Rs.Seventeen crore eighteen lakh seventy five thousand), which equates to approx Rs.5,00,00,000/- (Rs. Five Crore) per acre (which was approx 12.5 times of the prevailing rate).

6. As orally agreed between my client and you, the above project was likely to be completed by my client within 3 years therefore, accordingly, the approx. value of the above said land was calculated as Rs.17,18,75,000/- in Sept. 2016 for the purpose of security. Thus my client issued cheques for Rs.35,00,000/- of current dates and PDC's for Rs.1,80,00,000/- dated 10.03.2014 and PDC's dated 10.09.2016 amounting for Rs.15,03,75,000/- to you and other owners as a security, with a

clear understanding on your part that you and the other owners of the land will return the above cheques (current as well as PDC's dated 10.03.2014 & 10.09.2016) to my client, as my client pay/share profit by way of allotment of the above flats on completion of the above project, which were planned to be developed on the joint land i.e. earlier existing 13.237 acre land of my client and the above said land measuring 27 Kanal 10 Marla. The cheques were given with clear mutual understanding merely as abundant security to you & others and not for encashment. The above terms were orally discussed and agreed by you and other land owners in presence of Sh. Vikas Jain s/o Sh. Prem Chand Jain R/o H.No.504-A, Sector-12, Sonapat and others.

7. To fulfill the above obligations, my client incurred below mentioned expenses regarding this land measuring 27 Kanal 10 Marla in order to proceed as per agreement i.e. stamp duty for Rs.85,94,000/- paid at the time of execution of the above sale deed and LOI charges for Rs.47,49,907/- paid to Town & Country Planning Department, Chandigarh.”

A bare perusal of the above said three notices i.e. Annexure P-5, P-7 and P-8 clearly establishes the intention of the Company. First version propounded by the Company is that due to recession/slump in the real estate market, they are unable to pay the remaining amount and they had given an offer to return the land to the vendors. But subsequently, vide Annexures P-5 and P-8, they had created a story of an oral agreement. There is no material available on record if such an oral agreement was arrived at between the parties, albeit, it is matter of evidence. Even it is mentioned in Annexure P-8 that earlier the vendors had agreed to cancel the above said sale deed but this fact has been denied by learned counsel for the

complainants-respondents.

Apart from it, Section 91 of the Evidence Act does not recognize an oral agreement which runs contrary to the written registered agreement i.e. Sale deed (Annexure P-9). Thus, the plea of the Company that subsequently, an oral agreement substituted the contract of sale is neither tenable nor acceptable. Moreover, the same is matter of evidence. In this view of the matter, the letter with regard to stoppage of payment is a clear cut violation of the sale contract (Annexure P-3). Apart from it, when the cheque has become part of the sale consideration, the payment cannot be stopped.

The payment to the poor farmers through post dated cheques was part of sale consideration and it remained the legal liability of the Company to honour the cheques. By not honouring the cheques and giving said notices to the poor farmers shows malafide intention of the Company and its directors which amounts to cheating. It is well settled that to hold a person guilty of cheating as defined under section 415 of the Indian Penal Code, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise with an intention to retain the property. In other words, section 415 of the Indian Penal Code which defines cheating, requires deception of any person (a) inducing that person to : (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property, or (b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person, anybody's mind, reputation or property. The second class of acts set forth in the section is the doing or omitting to do anything which the person

deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but no fraudulent or dishonest.

In the case in hand, the Company at the time of execution of said sale deed has unequivocally represented that they are purchasing the land in lieu of the sale consideration paid through cheques details of which have been duly given in the sale deed. Thus, the Company and its directors were duty bound to honour all the cheques which were part of the sale consideration. In the beginning i.e. at the time of making the promise, the very intention of the Company was dishonest. Even such a dishonest intention can be inferred from the mere fact that the Company could not have successfully fulfilled the promise. Loss and damage was caused due to the acts of the Company and its directors. In fact, it is a natural consequence of the acts of the Company as complained of.

Giving of a cheque, as payment for purchasing the land, itself amounts to representation to the effect : -

(a) that the vendors had authority to draw on the bank for the cheque amounts and ;

(b) that the cheques are good, valid and in order for payment of their respective amounts and those will be honoured and amounts mentioned therein shall be paid to the holders thereof. It is not mere a case of breach of contract but also the acts of the Company amounts to cheating as provided under Section 415 of the Indian Penal Code.

It has been further argued on behalf of the petitioners that the

of the Company and its directors qua the offence under Section 138 of Negotiable Instruments Act does not arise at all. This Court has considered this contention but the same is misconceived. In the peculiar circumstances of the case when the cheques which have been dishonoured were the part of the sale consideration, the payment thereof cannot be stopped as did by the Company in this case. Hon'ble Supreme Court in **Goaplast Pvt. Ltd. v. Shri Chico Ursula D'Souza and another (supra)** had discussed the law in detail. It has been observed in para 6 to 8 as under : -

“In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For purpose of considering the issue, it is relevant to see [Section 139](#) of the Act which creates a presumption in favour of the holder of a cheque. The said Section provides that "it shall be presumed that, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in [Section 138](#) for the discharge, in whole or in part, or any debt or other liability". Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post- dated cheque, a party should not be allowed to get away from the penal provision of [Section 138](#) of the Act. A contrary view would render [Section 138](#) a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving

instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under [Section 138](#). Once a cheque is issued by a drawer, a presumption under [Section 139](#) must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under [Section 138](#) of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in [Modi Cements Ltd. vs. Kuchil Kumar Nandi](#) [1998 (3) SCC 249]. On same facts is the decision of this Court in [Ashok Yeshwant Badave vs. Surendra Madhavrao Nighojakar and another](#) [2001 (3) SCC 726]. The decision in Modi's case overruled an earlier decision of this Court in [Electronics Trade & Technology Development Corpn. Ltd. vs. Indian Technologists & Engineers](#) [AIR 1996 SC 2339] which had taken a contrary view. We are in respectful agreement with the view taken in Modi's case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of [Section 138](#) of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.

[NEPC Micon Ltd. & Ors. Vs. Magma Leasing Ltd.](#) [(1999) 4 SCC 253] was a case in which the drawer of the cheque closed the account in the Bank before presentation of the cheque and the cheque when presented was returned by the Bank with the remark "account closed". The question arose whether in this situation [Section 138](#) of the Act would be attracted. It was contended on behalf of the appellant that [Section 138](#) being a penal provision it should be strictly interpreted. [Section 138](#) according to the appellant applied only in two situations i.e. either because the money standing to the credit of the

account of the drawer is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with the bank. Rejecting the contentions raised on behalf of the accused this Court held that return of a cheque on account of account being closed would be similar to a situation where the cheque is returned on account of insufficiency of funds in the account of the drawer of the cheque. Before one closes his account in the Bank he withdraws the entire amount standing to credit in the account. Withdrawal of the entire amount would therefore mean that there were no funds in the account to honour the cheque which squarely brings the case within [Section 138](#) of the Act. On the question of strict interpretation of penal provisions raised on behalf of the accused it was observed: "If the interpretation, which is sought for, were given, then it would only encourage, dishonest persons to issue cheques and before presentation of the cheques, close the account and thereby escape from the penal consequences of [Section 138](#)." Any interpretation which withdraws the life and blood of the provision and makes it ineffective and a dead letter, should be averted. It is the duty of the Court to interpret the provision consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. The legislative purpose is to permit the efficacy of banking and of ensuring that in commercial or contractual transactions, cheques are not dishonoured and credibility in transacting business through banks is maintained. The Court relied upon its earlier judgment in *Modi Cement Ltd. (supra)*. We would like to quote the following observations contained in *NEPC Micon Ltd. & Ors. Vs. Magma Leasing Ltd. (supra)*. "15. " In view of the aforesaid discussion we are of the opinion that even though [section 138](#) is a penal statute, it is the duty of the Court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, [Section 138](#) of the Act has created

a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above "brush away the cobweb varnish, and shew the transactions in their true light" (Wilmot, C.J.) or, (by Maxwell) "to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited." Hence, when the cheque is returned by a bank with an endorsement "account closed", it would amount to returning the cheque unpaid because "the amount of money standing to the credit of that account is insufficient to honour the cheque" as envisaged in [Section 138](#) of the Act."

We are unable to agree with the reasoning adopted by the Courts below. The impugned judgments of the High Court and the Judicial Magistrate, Ist Class, Panaji, Goa are set aside. We hold that [Section 138](#) of the Negotiable Instruments Act will be attracted in the facts of the case. However, whether a case for punishment under that provision is made out, will depend on outcome of the trial. The cases are remanded to the concerned Judicial Magistrate for deciding the complaints filed by the appellant herein on merits in accordance with law. All the appeals are allowed. Nothing contained in this judgment be taken as expression of opinion on merits."

Another argument has also been raised by the counsel for the petitioner that the cheque was given as a security. This fact is mentioned in detail in notice (Annexure P-6) but to the mind of this Court, this is a concocted version and is an after thought. No cheque, as shown in the sale

consideration. It is admitted fact that the Company had purchased the land, took its possession and also developed the same as per its desires. The sale deed subsists very much and holds the sway till date. In this view of the matter, giving an offer to return the land is unethical and unlawful.

The peasantry/agrarian society in India always remain under turmoil, distraint and distress. This Court is not oblivious to the fact that the farmers are committing suicide in this part of the country due to numerous reasons. The act and conduct of the money lenders/financiers, the land grabbers/colonisers are one of the factors putting the peasants and small land owners in the pitiable conditions. It also causes a stigma on the philosophy of social and economic justice.

In this view of the matter, this Court is of the view that mere making of assertions and allegations in the notice (Annexure P-6) that an oral agreement was arrived at after execution of sale deed, does not absolve the Company and its directors from its liability qua the offence under Section 138 of Negotiable Instruments Act. Thus, a *prima facie* case is made out against the petitioner to prosecute them for the offence under Section 138 of the Negotiable Instruments Act.

It has also been argued that petitioner-Shri Gopi Ram Jain was mere a sleeping Director and not participated in the affairs of the Company and further that he had resigned from the Company much before the filing of the complaint.

The petitioner has placed on record letter dated 5.12.2018 issued by Ministry of Corporate Affairs, from which it transpires that the Company/LLP status of Shri Gopi Ram Jain petitioner was that of active

5.7.2016. But a bare perusal of resolution of the Company dated 5.7.2017 reveals that the resignation of Shri Gopi Ram Jain was accepted only on 5.7.2017 at about 3:00 p.m.. Thus, Shri Gopi Ram Jain petitioner was the active director of the Company and he was absolved of the duties only on 5.7.2017 i.e. much after dishonour of the cheques.

Whether a director is an active member and participated in the affairs of a Company is a matter of fact. In the case in hand, it is specifically averred in complaint (Annexure P-1) that all the directors namely Vikas Jain, Sulekha Jain and Gopi Ram Jain are the incharge and responsible to the Company for the conduct of the business and day to day affairs of the Company. With regard to the day to day business of the Company, there must be some internal arrangements. Different kinds of duties and acts have been allocated to the directors. The Company has to establish by leading cogent evidence that a particular director was given a particular duty. Even if a partner has been absolved of the duties, it must be mentioned in the memorandum of articles and other documents of the Company. These facts can be proved only by leading evidence during the trial. The onus is upon the directors of the Company especially Shri Gopi Ram Jain to prove that he was not associated with the affairs of the Company but nothing has been placed on record at this stage. Therefore, it cannot be said that he was sleeping director of the Company. Hon'ble Supreme Court in **Standard Chartered Bank v. State of Maharashtra and others (supra)** has discussed in detail with regard to liability of the directors and has observed in para 24 to 31 as under : -

“24. Be it noted, the observations made in Saroj Kumar Poddar (supra) and clarification given in SMS Pharma II (supra) and

Everest Advertising (P) Ltd. (supra) were taken note of in K.K. Ahuja v. V.K. Vora and Anr[19]. In the said case, the Court explaining the position under Section 141 of the Act has stated thus:-

"The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the Company, for the conduct of the business of the Company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the Company, for the conduct of the business of the Company.

(ii) In the case of a Director or an officer of the Company who signed the cheque on behalf of the Company, there is no need to make a specific averment that he was in charge of and was responsible to the Company, for the conduct of the business of the Company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the Company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, secretary or manager [as defined in Section 2(24) of the Companies Act] or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the Company, for the conduct of the business of the Company is necessary to bring the case under Section 141 (1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary

averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other officers of a Company cannot be made liable under sub-section (1) of Section 141. Other officers of a Company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the Company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

25. In *Harmeet Singh Paintal* (supra), a two-Judge Bench did not agree with the stand of the appellant, emphasized on the averments and found that in the complaint petition there were no specific averments and, accordingly, dismissed the appeal filed by the appellant-Corporation therein. The Court in paragraphs 17 and 18 of the judgment reproduced the part of the complaint. We have carefully perused the said averments in the claim petition and we are of the opinion that there cannot be any shadow of doubt that the assertions made therein did not meet the requirements of Section 141 of the Act.

26. In *A.K. Singhanian* (supra), after referring to the previous judgments, the Court found that it was difficult to infer that there was any averment that the two accused persons who had come to this Court, were in charge and responsible for the conduct of the business of the Company at the time the offence was committed. The allegation in the complaints in sum and substance was that business and financial affairs of the Company used to be decided, organized and administered by accused persons along with other Directors.

27. In *Gunmala Sales Pvt. Ltd.* (supra) the Court was concerned with Directors who issued the cheques. This authority, as we notice, has to be appositely understood. The two-Judge Bench referred to *SMS Pharma I* and other earlier decisions, and came to hold that:-

"30. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High

Court may find that the basic averment is sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the Company at the relevant time and therefore making him stand the trial would be an abuse of process of Court as no offence is made out against him.

31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his contention.

He must make out a case that making him stand the trial would be an abuse of process of Court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director."

[Emphasis supplied]

28. After so stating, the Court proceeded to summarise its conclusions, appreciated the averments made in the complaint petition and opined thus:- "... Pertinently, in the application filed by the respondents, no clear case was made out that at the material time, the Directors were not in charge of and were not responsible for the conduct of the business of the Company by referring to or producing any incontrovertible or unimpeachable evidence which is beyond suspicion or doubt or any totally acceptable circumstances. It is merely stated that Sidharth Mehta had resigned from the directorship of the Company on 30-9-2010 but no incontrovertible or unimpeachable evidence was produced before the High Court as was done in Anita Malhotra[20] to show that he had, in fact, resigned long before the cheques in question were issued.

Similar is the case with Kanhaiya Lal Mehta and Anu Mehta. Nothing was produced to substantiate the contention that they were not in charge of and not responsible for the conduct of the business of the Company at the relevant time. In the circumstances, we are of the opinion that the matter deserves to be remitted to the High Court for fresh hearing. However, we are inclined to confirm the order passed by the High Court quashing the process as against Shobha Mehta. Shobha Mehta is stated to be an old lady who is over 70 years of age.

Considering this fact and on an overall reading of the complaint in the peculiar facts and circumstances of the case, we feel that making her stand the trial would be an abuse of process of Court. It is however, necessary for the High Court to consider the cases of other Directors in light of the decisions considered by us and the conclusions drawn by us in this judgment."

29. We have referred to the aforesaid decision in extenso, as we are of the convinced opinion that the analysis made therein would squarely apply to the case at hand and it shall be clear when we reproduce certain passages from the complaint.

30. Prior to that, we may profitably refer to a two-Judge Bench decision in Tamil Nadu News Print & Papers Ltd. v. D. Karunakar and Others[21]. In the said case, the Court has referred to the decision rendered in S.M.S. Pharma I (supra) and, thereafter, taken note of the averments made in the complaint. Be it noted, in the said case it had been averred in the complaint petition that the accused Nos. 2 to 9 were Directors and were in day to day management of the accused Company and in that context the Court has opined as follows:- "Upon perusal of the complaint, we find that an averment has been made to the effect that Accused Nos.3 to 10 were in fact, in-charge of the day-to- day business of Accused No.1- Company."

31. We have referred to these decisions as they explicitly state the development of law and also lay down the duty of the High Court while exercising the power of quashing regard being had to the averments made in the complaint petition to attract the vicarious liability of the persons responsible under Section 141 of the Act."

Further in the concluding paragraphs 33 and 34, it has been observed as under : -

"33. The aforesaid averments, as we find, clearly meet the requisite test. It is apt to mention here that there are seven accused persons. Accused No.1 is the Company, accused Nos.2 and 3 are the Chairman and Managing Director respectively and accused Nos.6 and 7 were signatory to the cheques. As far as the accused Nos.4 and 5 were concerned, they were whole-time Directors and the assertion is that they were in charge of day to day business of the Company and all of them had with active connivance, mischievously and intentionally issued the cheques in question.

34. Thus, considering the totality of assertions made in the complaint and also taking note of the averments put forth relating to the respondent Nos. 2 and 3 herein that they are whole-time Director and Executive Director and they were in charge of day to day affairs of the Company, we are of the considered opinion that the High Court has fallen into grave error by coming to the conclusion that there are no specific averments in the complaint for issuance of summons against the said accused persons. We unhesitatingly hold so as the asseverations made in the complaint meet the test laid down in *Gunmala Sales Pvt. Ltd. (supra)*.”

Similar observations were made by this Court in **Kailash Chand Jain v. M/s Bibby Financial Services India Pvt. Ltd. (supra)** and **Shri Krishan Garg v. Smt. Rajni Jain and others (supra)**. However, the facts **Pooja Ravinder Devidasini v. State of Maharashtra and another (supra)** and **N.K. Wahi v. Shekhar Singh and others (supra)** are distinguishable on facts.

It has also been argued on behalf of the petitioners that in fact, a road was carved out in the land of the vendors but they did not disclose this fact to the petitioners. To substantiate this plea, a copy of revised Sazra-cum-Sectoral Plan, Sector 22, residential area, Dharuhera has been placed on the record. This document was prepared by Department of Town and Country Planning, Haryana on 17.4.2012 but as per the pleading in Civil Suit (Annexure P-11) raised by the Company as well as in the notices Annexures P-5, P-6 and P-8, it is very much clear that the petitioners had developed their land into a residential colony, which was adjoining to the land in question, much before execution of the sale deed. It is specifically stated in notice Annexure P-6 that the company had obtained LOI on

13.10.2012 and requisite licence was obtained on 18.3.2013 and building plan was sanctioned 16.4.2013 by Government of Haryana with regard to the land measuring 13.237 acres. That land owned by the Company was adjoining to the land covered by above said deed dated 11.9.2013. It is specifically stated in Annexure P-6 that the adjoining land which was owned by the vendors-complainants did not have access from any existing or proposed wide road. Nothing is mentioned in the sale deed if any road was there. In the circumstances of the case, it is not acceptable that the sale deed was in any way defective due to the reason that road was constructed in or around the land of the vendors. Apart from it, it is a matter of evidence.

The Company has added insult to the injury to the vendors respondents by submitting an application on 3.12.2018 (Annexure P-13) to the police for registration of the FIR against them. This Court would like to reproduce para 3 to 5 of the application as under : -

“3. That the above mentioned offenders culprit dishonestly induces the Company and its management to purchase land comprised in Khewat No.5, Khatoni No.5 rect. No.34 Killa No.11, 19, 20, 22/1 total area 27 Kanal 10 Marla situated in the revenue estate of village Maheshwari Sub Tehsil Dharuhera, Distt. Rewari (the “Said Land”) through sale deed bearing No.1311 for total sale consideration of Rs. 17,18,75,000/- (Seventeen Crore Eighteen Lakhs Seventy Five thousand only) in favour of the Company namely S.K.G. Buildcon Pvt. Ltd. That this sale deed was executed on the basis of the mutual understanding that the Company will include this land in the project and after development of the project consideration will be paid by way of Post dated Cheques as per details mentioned the sale deed etc.

4. That the malice intent of the offenders exposed from the fact that they did not disclosed the facts that out of the said land

an area equal to 0.790 Acres in Killa No.19 & 20 was marked under 24 meter wide internal sector road, this is clear from the DHARUHERA REVISED SAZARA CUM SECTORAL PLAN OF SECTOR 22 (RESIDENTIAL) APPROVED BY DEPTT. OF TOWN & COUNTRY PLANNING, HARYANA AS ON DATED 17.04.2012.

5. These facts makes it abundantly clear that by executing the sale deed of land area of 0.790 acres in Killa No.19 & 20 which is marked at Sectoral road 24 Meter in the Government records above mention offenders have committed the offenses of CHEATING FRAUD, BREACH OF TRUST, MISREPRESENTATION AND WRONGFUL LOSS etc. against the Company.”

On a bare perusal of the same, it transpires that instead of making payment of the sale consideration, the Company itself has tried to set up criminal law in motion by writing complaint to the police for registration of the FIR against the hapless farmers. It seems that the Company and its directors want to harass them even by using extra judicial and extra legal methodology. Nothing has been placed on the record to show that the sale deed was executed on the mutual understanding of the vendors and that of the Company or that the Company will include this land in its colony and after development of the project, consideration will be paid by post dated cheques as per the details mentioned in the sale deed. The contents of letter dated 3.12.2018 are not only violation of the sale deed but it is also in violation of 91 of the Evidence Act.

In this view of the matter, a direction is given to the State not to take any action on the application dated 3.12.2018 (Annexure P-13) till the disposal of the proceedings under Section 138 of the Negotiable Instruments

The Hon'ble Supreme Court in **State of Haryana and others v. Ch. Bhajan Lal and Ors.**, 1992 AIR (SC) 604 has made the following observations:-

“In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Whether the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order

of a Magistrate within the purview of Section 155 (2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Whether, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

5. Where the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

Viewed from all angles and especially by placing reliance on the ratio laid down by Hon'ble Supreme Court in Chaudhary Bhajan's case (supra), this Court is of the view that no case is made out to quash the impugned complaints and summoning orders in the above captioned petitions. Thus, findings all the petitions bereft of any merit, the same are dismissed with special costs of Rs. 50,000/- (for all the petitions) which shall be paid by way of bank draft to the private respondents-complainants in equal shares within one month from the date of receipt of a certified copy of the judgment.

However, nothing expressed above shall affect the merits of the case. Trial Court shall decide each complaint on the basis of substantive sentence adduced before it.

January 24, 2019
Paritosh Kumar

(RAJ SHEKHAR ATTRI)
JUDGE

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes